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Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory

Letter dated 30 June 2005 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly

I have the honour to transmit herewith the report prepared by Switzerland in its capacity as depositary of the Geneva Conventions, pursuant to paragraph 7 of resolution ES-10/15, adopted by the General Assembly on 20 July 2004, at the 27th meeting of its tenth emergency special session, which states:

> *"[The General Assembly] [c]alls upon all States parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention, and invites Switzerland, in its capacity as the depositary of the Geneva Conventions, to conduct consultations and to report to the General Assembly on the matter, including with regard to the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention"*

Pursuant to its mandate, Switzerland held broad consultations with the parties to the conflict, the actors involved in the peace process and other important actors in the region. All the High Contracting Parties to the Fourth Geneva Convention were also informed and consulted.

The present report was prepared by the depositary on the basis of those consultations; it contains summaries of the proposals and responses collected. The depositary was encouraged by a large number of parties not only to report on the results of the consultations, but also to formulate concluding observations. The report was concluded on 27 June 2005 and does not take into account any developments subsequent to that date.

Switzerland wishes to thank the High Contracting Parties to the Fourth Geneva Convention and all the other parties concerned for their cooperation and the support they provided throughout the consultations.

I should be grateful if you would circulate this report as a document of the tenth emergency special session of the General Assembly, under agenda item 5.

(*Signed*) Peter **Maurer**
Permanent Representative of Switzerland

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Annex to the letter dated 30 June 2005 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly

Report by Switzerland, in its capacity as the depositary of the Geneva Conventions, pursuant to General Assembly resolution ES-10/15

27 June 2005

I. Introduction

1. At the 23rd meeting of its tenth emergency special session, on 8 December 2003, the General Assembly adopted resolution ES-10/14, by which it requested the International Court of Justice to render an advisory opinion on the legal consequences "arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem".[1]

2. On 9 July 2004, the International Court of Justice delivered its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The advisory opinion, along with the separate opinions and the declaration appended thereto, was transmitted by the Secretary-General to the General Assembly on 13 July 2004.[2]

3. The International Court of Justice replied to the question put forth by the General Assembly in resolution ES-10/14 as follows:[3]

> "A. The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law;
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> "B. Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto, in accordance with paragraph 151 of this Opinion;
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> "C. Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem;
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> "D. All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction; all States Parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while

[1] See A/RES/ES-10/14.
[2] See A/ES-10/273 and Corr.1.
[3] See A/ES-10/273, para. 163.

respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention;

"E. The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion."

4. At the 27th meeting of its tenth emergency special session, on 20 July 2004, the General Assembly adopted resolution ES-10/15 by which it "[*a*]*cknowledges* the advisory opinion of the International Court of Justice [...]"[4] and "[*d*]*emands* that Israel, the occupying Power, comply with its legal obligations as mentioned in the advisory opinion".[5] Furthermore, the General Assembly, through paragraph 7 of resolution ES-10/15:

"*Calls* upon all States parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention, and invites Switzerland, in its capacity as the depositary of the Geneva Conventions, to conduct consultations and to report to the General Assembly on the matter, including with regard to the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention;"

5. The present report is submitted pursuant to paragraph 7 of resolution ES-10/15. It represents the depositary's summary of consultations undertaken and responses received from the High Contracting Parties to the Fourth Geneva Convention.

II. Consultations

6. In carrying out its mandate, the depositary began the consultations with the parties directly concerned and continued with the actors involved in the peace process and other important actors in the region. The depositary then consulted all the High Contracting Parties to the Fourth Geneva Convention.

7. The consultations took place in the capitals.

8. The depositary was able to count on the cooperation of all parties.

9. The depositary was encouraged not only to report on the consultations undertaken but also to formulate concluding observations.

III. Political context

10. The consultations were conducted in a context of ongoing political changes, with the advisory opinion as legal framework.

11. Various interlocutors emphasized the fact that the situation has changed since the adoption of resolution ES-10/15. They welcomed the encouraging political developments observed in the region over the past months. There is hope that these

[4] See A/RES/ES-10/15, para. 1.
[5] See A/RES/ES-10/15, para. 2.

developments, which include the implementation of the disengagement plan from the Gaza Strip and the Northern West Bank, will contribute to relaunching the political process.

12. Apprehension was expressed that the disengagement from the Gaza Strip and the Northern West Bank would bring about a transfer of settlers to one or the other of the settlements remaining in the West Bank and in East Jerusalem.

13. Mention was made of the lack of implementation of the Quartet road map and the delays in the implementation of the Sharm el-Sheikh Summit commitments. It was considered to be of paramount importance that the two parties respect and implement their respective commitments.

14. Several States expressed their concerns regarding the situation created on the ground in the West Bank and the impact of these activities on East Jerusalem. They also underlined the risk that this situation will prejudge negotiations to come on the final status and the borders of a future Palestinian State, or even render unrealistic the vision of two States living side by side in peace and security.

IV. Results

A. General remarks

15. The question of the scope of the mandate and of its interpretation by the High Contracting Parties was raised.

16. The majority supports a broad interpretation of the mandate, meaning respect for the Fourth Geneva Convention throughout the Occupied Palestinian Territory. A minority advocates for an interpretation limited to the barrier[6] and its direct consequences. An approach consisting of a broad interpretation while paying special attention to the barrier can be supported by all those consulted.

17. Resolution ES-10/15 refers to a conference of High Contracting Parties as one option among others. The consultations produced a virtual consensus on the inadvisability of holding a new conference in the present circumstances. Some States expressed opposition on principle: a conference is likely to politicize international humanitarian law and to pose an obstacle to relaunching the peace process. Others considered that it would be difficult to determine what a new conference could possibly contribute in the way of added value, given the conclusions reached by the International Court of Justice in its advisory opinion. Others noted that two conferences of High Contracting Parties had already been held, in 1999 and 2001 respectively; a declaration emphasizing law and the obligations of the parties to the conflict, of the occupying Power, and of the High Contracting Parties had been adopted on 5 December 2001. A very small minority considered that a conference should not automatically be dismissed.

18. At the same time, all the High Contracting Parties recognize the need to improve rapidly the living conditions of the civilian population in the Occupied

[6] The depositary is aware of the discussion about the correct term for the structure in question. For the purposes of this communication, the depositary will use the term "barrier" for the reasons set forth in the report of the Secretary-General of 24 November 2003 prepared pursuant to General Assembly resolution ES-10/13.

Palestinian Territory and to identify concrete measures for doing so. Some noted the high expectations of the Palestinian civilian population for a speedy and tangible improvement in its everyday life.

19. It was suggested by some that political progress and the implementation of the Quartet road map constitute the best means to achieve improvements in the humanitarian situation.

20. However, the great majority considers that an improvement in the humanitarian situation, by means of greater respect for international humanitarian law, would create an environment favourable to political progress. Certain States feel that respect for international humanitarian law as such also constitutes a confidence-building measure.

21. Encouraging dialogue and direct contact among the parties to the conflict is considered to be a priority.

22. The vast majority of States reaffirm that the applicable legal framework and the obligations of the parties concerned were determined by the International Court of Justice in its advisory opinion of 9 July 2004 and cannot be called into question.

23. Israel is generally expected to abide by the law and the findings of the advisory opinion. In addition to the conclusions regarding the barrier, many of the States consulted reaffirmed the de jure applicability of the Fourth Geneva Convention and of the human rights instruments ratified by Israel; the illegality of the settlements established by Israel in the Occupied Palestinian Territory, including in and around East Jerusalem; and the right of the Palestinian people to self-determination.

24. Israel's right to defend its population is recognized, provided that the measures taken in this regard conform to international law principles and standards. Similarly, the Palestinian Authority is expected to take the necessary measures to ensure security and to prevent attacks against civilians, which notably take the form of suicide attacks, and to prosecute those responsible.

25. Many recognize the changes made by Israel in the route of the barrier, as well as the fact that it has in certain stretches been made to approach, or in places run concurrent with, the Green Line. Such changes, however, were found to be insufficient from the standpoint of international law and of the conditions set forth in the advisory opinion of the International Court of Justice. The continuing construction of the barrier in the Occupied Palestinian Territory is qualified as contrary to international law and as a source of preoccupation. Israel is expected to dismantle the barrier situated in the Occupied Palestinian Territory.

26. The activities associated with the settlements, such as their expansion, their development, as well as the growing number of outposts, are a source of concern. The same can be said of the link between settlement activities and the barrier's route. The freezing of all settlement activity, in accordance with the Quartet road map, and of the construction of bypass roads was mentioned several times as indispensable for the relaunching of the peace process.

27. Many States noted the barrier's associated regime and its negative effects on the Palestinian civilian population: the separation of communities by the creation of closed zones and enclaves, the infringement of property rights and land confiscation, the permit regime and its arbitrary implementation and the additional

restrictions on freedom of movement. With regard to the regime associated with the settlements, mention was made of the bypass roads and the establishment of a network of roads reserved for the settlers.

28. Many States believe that Israel is prepared to accept and implement selective measures, but not to significantly modify its policy towards the Occupied Palestinian Territory. Some States think Israel's objective is to stall for time in order to ensure its control over East Jerusalem and the West Bank by continuing to build the barrier, by expanding the settlements and by implementing other measures that contribute to changing the appearance and demographic make-up of the Occupied Palestinian Territory.

29. Without minimizing the importance of the obligations arising from international law, as reaffirmed in the advisory opinion, the great majority of those consulted recommend proceeding to improve the lot of the Palestinians progressively through the implementation of concrete measures.

B. Proposals

30. Various proposals were made in relation to the barrier. Certain States asked that it be dismantled, while others proposed that changes be made to its route along the Green Line. Still others called for a firm commitment on Israel's part to dismantle the barrier as soon as the security situation becomes satisfactory, or, at the very latest, five years from the present date. Another proposal involved Israel declaring an initial three- to six-month moratorium on the construction of the barrier, as a sign of its commitment to relaunching the peace process. Mention was also made of the fact that no financial contribution should permit or facilitate the construction of the barrier.

31. Restrictions to freedom of movement are recognized as the main cause of the humanitarian, economic and social crisis afflicting the Occupied Palestinian Territory. The situation was considered to comprise two complementary problems of access: one, the access of humanitarian organizations to the populations concerned, and two, the civilian population's access to social and economic goods and services, to its land and to its place of work. A reduction in the number of checkpoints and roadblocks would mean an improvement in freedom of movement among cities as well as between cities and neighbouring villages, and would help to improve the humanitarian situation.

32. It is generally considered imperative that the civilian population's access to schools, hospitals and agricultural land be improved. The normal import and export of goods to and from the Gaza Strip and the West Bank, as well as between these two parts of the Occupied Palestinian Territory, must be guaranteed in order to permit economic recovery. Access between East Jerusalem and the West Bank as well as humanitarian access must be ensured at all times, the latter taking on particular importance in the context of the withdrawal from the Gaza Strip.

33. Other more specific measures were also mentioned, including the release of political prisoners and detained women and the improvement of infrastructure, notably in the water sector. Israel's renunciation at the Sharm el-Sheikh Summit of extrajudicial executions and of its policy of collective punishments, such as house demolitions, is considered a key measure which must be maintained.

34. Dialogue between the parties to the conflict, and support for such dialogue, was emphasized as crucial. Various proposals were made in this regard: dialogue between Israel and the Palestinian Authority, with possible facilitation from third-party States; the establishment of a mechanism to further dialogue between the parties to the conflict, involving the participation by a group of States enjoying the trust of both parties and committed to ensuring respect for the Geneva Conventions; and the establishment of two such mechanisms in parallel, one with Israel, the other with the Palestinian Authority, each with the participation of a group of States enjoying the trust of both parties, and committed to ensuring respect for the Geneva Conventions. The modalities with regard to level (technical or political) and character (formal or informal) as well as follow-up would still need to be defined.

35. Another proposal was for an informal meeting of experts to discuss the challenges to the application of international humanitarian law in the context of the Israeli-Palestinian conflict.

36. A proposal was made for monthly reporting on the implementation of resolution ES-10/15. Another proposal involved establishing a mechanism to centralize all information concerning compliance with the Fourth Geneva Convention and to guarantee its dissemination.

37. Some States referred to the elements mentioned in the Declaration on Palestine adopted at the Ministerial Conference of the Non-Aligned Movement in August 2004 in Durban, South Africa.[7]

C. Position and proposals of parties concerned

38. Israel maintains that the barrier is a temporary measure and justifies its construction on security grounds and the fact that it contributes to saving lives.

39. Changes to the route of the barrier were carried out following the judgement handed down by the Israeli Supreme Court on 30 June 2004 in the *Beit Sourik Village Council vs. the Government of Israel and vs. Commander of the IDF Forces in the West Bank* case. The Israeli Supreme Court held the barrier's construction to be in itself in accordance with international law applicable to an area under occupation if it is necessitated by military needs. Under this condition, the construction of the barrier is within the authority of the military commander. But this authority is inherently temporary as occupation is by definition temporary.

40. The Israeli Supreme Court affirmed the military authorities' obligation to respect international humanitarian law and Israel's own principles of administrative law in their choice of a route for the barrier; in particular the principle of proportionality which requires a balance between military interests on the one hand and the rights and needs of the affected local population on the other. On this basis, the Court nullified certain land requisition orders made by the military, and thus obliged it to modify the barrier's course along the stretches in question.

41. Israel underlines that the barrier's route is subject to constant re-examination in the light of the principles established by the Israeli Supreme Court's judgement in the *Beit Sourik* case. Other hearings relating to the barrier are under way.

[7] The Declaration can be read at the following Internet site: www.nam.gov.za/media/040820a.htm.

42. Israel states that, since the Palestinian presidential elections and the Sharm el-Sheikh Summit, it has taken a number of steps aimed at easing the Palestinians' lives. Such steps include transfer of cities to Palestinian Authority responsibility; release of prisoners; opening crossing points between Israel and the West Bank and the Gaza Strip; increasing work permits in Israel for Palestinians; easing restrictions on the entrance of Palestinians into Israel; lifting roadblocks and easing movement within the West Bank and the Gaza Strip.[8]

43. Although it has stressed the temporary nature of the barrier, Israel does not want to make any advance promise to dismantle, even if the security situation were to improve. Israel has said that it will pursue its construction of the barrier.

44. As for the mandate, Israel has declared its willingness to cooperate and to pursue a dialogue with the depositary. Israel has also proposed that the depositary present, for the time being, an interim report to the General Assembly, and continue the dialogue. However, Israel is opposed to any form of institutional follow-up.

45. According to Israel, measures it will take in the future, like those mentioned in paragraph 42, will depend on the evolution of the political and security situations. Israel has said that it is not prepared to make commitments within the context of the present mandate.

46. For its part, the Palestinian Authority remains extremely concerned by developments on the ground, in particular by the ongoing construction of the barrier and by the expansion and construction of new settlements in the West Bank and in East Jerusalem. The Palestinian Authority stresses the urgency of the situation, and the fact that developments on the ground are destroying the territorial integrity and unity of the Occupied Palestinian Territory, including East Jerusalem, and undermining the efforts aiming to achieve a just, peaceful and lasting settlement of the conflict based on the two-State solution.

47. The Palestinian Authority is of the view that it is imperative that States make a clear distinction between their relations with Israel as a State and with Israel as an occupying Power in terms of its activities in the Occupied Palestinian Territory, including East Jerusalem. It emphasizes that actions and measures taken by Israel, occupying Power, should be considered and evaluated by States on the basis of the relevant rules and principles of international law, including international humanitarian law and human rights law. The Palestinian Authority expects States to accept their responsibilities under the Fourth Geneva Convention and take the appropriate measures.

48. The Palestinian Authority proposes as an initial measure the establishment of a group of friends with the intention of making regular representations to Israel and convincing it that it must comply with international law, both in keeping with its obligations and in its own interest. Such friends would be drawn from among the States close to Israel.

49. If such a group were unable to bring about a change in Israel's policy, the Palestinian Authority deems that it would be necessary to consider the proposals contained in the Declaration on Palestine adopted by the Non-Aligned Movement in

[8] See the document "Israeli Assistance Steps and Humanitarian Measures Towards the Palestinians Following the Palestinian Elections and the Sharm el-Sheikh Summit — May 2005", available at www.mfa.gov.il.

August 2004, in particular its calls for vigorous action on the part of the Security Council; for punitive measures aimed at preventing the entry of any products from the settlements, at declining entry of settlers and at imposing sanctions against companies and entities involved in the construction of the barrier and other illegal activities in the Occupied Palestinian Territory; and for the adoption of measures by the High Contracting Parties with a view to ensuring Israel's compliance with its obligations under the Fourth Geneva Convention, especially as regards the punishment of grave breaches.

50. The Palestinian Authority expects a concrete and institutional follow-up to resolution ES-10/15, as well as intensified efforts on the part of the international community.

V. Concluding observations

51. Israel's occupation of the Gaza Strip and the West Bank, including East Jerusalem, is not taking place in a legal void. International humanitarian law, and in particular the Fourth Geneva Convention, constitutes the legal framework applicable to a situation of occupation. It sets out the obligations of all parties to the conflict, as well as those specifically binding upon an occupying Power. It remains essential that it be respected. The advisory opinion of the International Court of Justice confirms the de jure applicability of the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem, which Israel continues to contest.

52. Israel justifies the barrier on security grounds. There is currently no expectation that Israel will agree to dismantle the barrier, or ensure that it is built entirely along the Green Line. Nevertheless, Israel has declared that the barrier is a temporary security means for the prevention of terrorist attacks. It follows that an improvement in the security situation should make it possible to dismantle the barrier or move it so that it follows along the Green Line and to put a freeze on its construction. A formal commitment from Israel along these lines would contribute to reducing mistrust provided that it is accompanied by a complete freeze on all settlement activities.

53. The Palestinian Authority, for its part, should pursue its efforts and its commitment to contribute to the improvement of the security situation. This includes a strong commitment to reform its security services and improve their performance, to ensure the maintenance of order and security; and to prevent attacks against civilians and prosecute those responsible for such attacks.

54. Israel must continue to take measures on behalf of the Palestinian population in accordance with its international humanitarian law obligations. A number of measures have already been taken, in large part on the basis of judgements handed down by the Israeli Supreme Court. Additional measures are necessary.

55. The improvement of the humanitarian, economic and social situation throughout the Occupied Palestinian Territory remains of primary importance, regardless of developments at the political and security levels. Concrete measures can, moreover, help to re-establish mutual trust.

56. In this context, it is incumbent on Israel, as the occupying Power, to take all necessary measures to facilitate and to promote the movement of persons and goods in the Occupied Palestinian Territory and between that territory and the outside

world. This obligation remains applicable despite possible situations of insecurity. In such circumstances, Israel has the right to take the necessary measures to maintain the security of its armed forces and of its territory, but it must ensure at all times the access of the Palestinian population to essential goods and services.

57. It is imperative that the parties concerned, neighbouring countries and the other High Contracting Parties recognize the urgency of reaching substantial and systemic improvements to the living conditions of the Palestinian population, in particular in terms of access to education, health services, employment, and a productive economic, social, and cultural life. Such measures are all the more important since they are at the centre of a vision of human security which aims to reinforce in time the viability of Palestinian institutions and stability in the region.

58. The consultations suggest that a conference of High Contracting Parties is not the course to be pursued at the moment.

59. Instead, a mechanism promoting dialogue should be envisaged. The depositary has proposed the establishment of two separate dialogue groups, one with Israel, the other with the Palestinian Authority, reporting to the Quartet. These would require the input of other States which have the confidence of both parties and are committed to ensuring respect for the Geneva Conventions. The modalities of these dialogue groups remain to be discussed. These dialogues should further respect international humanitarian law and contribute to the improvement of the humanitarian situation, in particular by promoting the lifting of restrictions imposed on the movement of Palestinian persons and goods within as well as outside the Occupied Palestinian Territory.

60. Despite the fact that the above-mentioned proposals did not enjoy the necessary support from the parties concerned, the depositary continues to consider that the approach is in itself a promising one, and believes that the modalities are worth examining in further detail.

61. The depositary echoes the position of the International Court of Justice. It is also convinced that only a negotiated settlement of the Israeli-Palestinian conflict, based on international law, will ensure peace and security in the region with two States, Israel and Palestine, living side by side.

62. The depositary submits the present report to the General Assembly pursuant to resolution ES-10/15.